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IN THE

Supreme Court of the United States

October Term, 1965

No. 75

AMERICAN DISTRICT TELEGRAPH COMPANY,
Appellant,

vs.

UNITED STATES OF AMERICA.

On Appeal from the United States District Court
For the District of Rhode Island

REPLY BRIEF FOR APPELLANT AMERICAN DISTRICT TELEGRAPH COMPANY

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SUMMARY OF ARGUMENT

The District Court explicitly rested its finding of violation upon a presumption that once the relevant market is established and a defendant is shown to have a predominant share of that market, it follows that he has monopoly power and has monopolized. In its brief, however, the Government refuses to support such a presumption and thus has now abandoned the rationale upon which the District Court decided the case. The Government does, however, admit that the only basis for inferring monopoly power here lies in the District Court's conclusion that the market is limited solely to services, both insurance-approved and unap-

proved, furnished by accredited central stations and that defendants had 87% of such revenue in 1961.

The Government is unable to supply any valid rationale to justify the District Court's joinder in a single market, contrary to the fundamental principles of *Cellophane*,[1] of diverse central station services which do not compete with each other, are in no sense substitutes for one another, and lack interrelationship in price and demand. Similarly, the Government has been unable to supply any valid rationale for the District Court's conclusion that there is a national market in an industry where services are closely circumscribed geographically to single cities and their immediate environs and where costs, prices and competitive conditions vary substantially from one locality to another.

The District Court erroneously concluded that *Cellophane* was no longer the law and consequently excluded all forms of protection other than accredited central stations from the market despite evidence of marked interchangeability or cross-elasticity of demand. To support this result, the Government, while paying nominal deference to *Cellophane*, misconstrues that decision as requiring (1) that the interchangeable products must be virtually identical, (2) that this identity must exist regardless of the existence of cross-elasticity of demand, and (3) that where virtual identity exists there must be "high cross-elasticity" not just "reasonable cross-elasticity." These contentions are not supported by either the majority or the dissenting opinions in *Cellophane*.

Although the District Court merely presumed monopolization, the Government urges that, in addition to monopoly inferred solely from market definition and percentages, the wilful conduct requisite to monopolization can be found here. Principally on the basis of ADT's conduct of its business, the Government argues that the alarm company defendants have monopolized by engaging in practices for the purpose of restraining and excluding competitors. These arguments were rejected by the District

1. *United States* v. *E. I. du Pont de Nemours & Co.*, 351 U. S. 377 (1956).

Court in many instances and are not supported by the record. More important, they further contradict the definition of the market found below and the existence of monopoly power.

For example, the Government argues that ADT's prices were designed to eliminate competition. The record merely shows that ADT, like any other business which lacks monopoly power, has been forced to meet (not beat) competitors' prices in the cities where it operates. Moreover, although the Government argues that the market is confined to accredited central station services, the evidence demonstrates that it has been necessary for ADT to reduce its prices to meet the competition of forms of protection other than services furnished by accredited central stations.

The claim that ADT subsidizes "price-cutting activities in competitive" markets with profits from "monopoly" markets is entirely unfounded. In fact, the record shows that ADT makes more money, both absolutely and relatively, in the "non-monopoly" city markets where it faces accredited central station competition. Similarly, the Government claims that ADT enhanced its market position by 27 acquisitions, but all but two of those acquisitions were protection concerns other than accredited central stations, and like the hundreds of other such concerns, fall outside the relevant market allegedly monopolized. Other claims of the Government are similarly without evidentiary support.

Finally, the Government has not justified its requested remand for further hearings on relief. It asks this Court to determine in the abstract, without close considerations of the facts, what can only be properly determined after consideration of the facts—that is the type of relief which should be imposed. It seeks to justify this request principally on the wholly improper ground that the defendants allegedly "agreed additional relief would be appropriate" because of submissions made during the course of settlement negotiations. Over and above this, it can cite no sound reasons for a rehearing on a subject already thoroughly explored by the District Court.

ARGUMENT

I

THE GOVERNMENT ABANDONS THE DISTRICT COURT'S PRESUMPTION OF MONOPOLIZATION WHICH WAS THE BASIS OF THE DECISION BELOW.

The Government here refuses to support the post-trial presumptions of monopoly and monopolization created by the District Court.[2] (Br., p. 82) But that is the basis on which the court below decided this case, expressly declaring before it spelled out its newly-fashioned presumptions that it was taking "this opportunity to make explicit certain aspects of its approach to this controversy." (R. 744) And in its opinion on liability, the District Court reiterated that it had proceeded on the basis that once defendants' share of the market is shown they "stand condemned" unless they carry the burden of showing that their share of the market is "attributable *exclusively* to * * * skill, efficiency, foresight, or like affirmatively laudable business conduct." (OL 3, R. 762)

In its Jurisdictional Statement to this Court, even the Government conceded that in the final analysis the court below found violations of the Sherman Act by defendants solely upon the basis of presumptions arising out of market share statistics. Thus, the Government urged that ADT had engaged in "predatory practices" but that "the District Court did not find it necessary, under its theory, to make findings with respect to all of ADT's conduct, * * *" (GJS, p. 13)[3] Moreover, as we show here-

2. "* * * [O]nce the Government has borne the burden of proving that is the relevant market and how predominant a share of that market defendant has, it follows that there are rebuttable presumptions that defendant has monopoly power and has monopolized in violation of §2." (R. 746)

3. The Government claims (Br., p. 82) that "the District Court held (R. 762)—that the defendants' monopoly power was consciously acquired and not thrust upon them, * * *" However, any such conclusion was reached by a judge who was under the impression that the burden was on the defendants to *disprove* monopolization. Had the burden not been so shifted, the District Court might well have found no violation.

fter, if the District Court's presumptions were not in fact the basis of its decision, then many of the Government's arguments as to monopolization must fall because the court below made no findings to support the Government's view of much of the evidence.

II

THE GOVERNMENT OFFERS NO VALID RATIONALE FOR LUMPING TOGETHER IN A SINGLE MARKET NON-COMPETING, CENTRAL STATION SERVICES DIRECTED TO DIFFERENT END USES WHERE THE ISSUE IS THE POWER OVER PRICE OR COMPETITION ESSENTIAL TO MONOPOLY.

Conceding that the District Court did not "justify treating all central service as a single market * * *", the Government is forced to assume an "implicit finding that the entire central service industry is a single business." (Br., p. 46) It urges that *Cellophane* "does not deal with the question whether different products may properly be combined in a single market which reflects the commercial conditions under which they are sold." (Br., p. 48)

To the contrary, *Cellophane* teaches that the ability and willingness of customers to use one product or service in lieu of another is the starting point of inquiry where market definition is undertaken to determine the existence of monopoly power. To be included in such a market, products or services must be both functionally and reactively interchangeable. If they are not, they cannot have the price interrelationship, responsiveness and sensitivity which alone justify their consideration in determining whether an alleged monopolist has the power to control price or competition as to a particular product or service. This Court has consistently announced that "the *outer boundaries* of a product market are determined by the reasonable interchangeability or the cross-elasticity of demand between the product itself and substitutes for it." *Brown Shoe Co.* v. *United States*, 370 U. S. 294, 325 (1962)

The Government can offer no valid factual basis for joining together in a single market such diverse end use services as those directed to fire, burglary or industrial process supervisory protection.[4] Even if, contrary to fact, all accredited central stations furnished the full panoply of services directed to all of the many diverse hazards and risks, treating "the various forms of protection * * * as integral parts of a single business" does not make it "proper to define the market to include all those parts in order to ascertain whether someone has monopoly power over that business," as the Government argues. (Br., p. 48)

Unless these disparate services directed to wholly different end uses are substitutes for each other or compete with each other so that price and demand for one are competitively interrelated with and have impact upon price and

4. The Government erroneously urges that "firms in the central station business generally provide all forms of protection." (Br., p. 47) To the contrary the record shows that very few accredited central stations furnish the full variety of services included in the market found below, and such significant services as those directed to burglar or fire protection are not furnished by other accredited central stations than just Holmes and AFA. (E.g., GX 312, R. 2274; GX 319, pp. 2, 9, R. 2419, 2423; GX 347, pp. 2, 4-5, R. 3005-06; GX 349, pp. 2-3, R. 3028; GX 351, pp. 7-8, R. 3028) As the cited evidence shows, American Alarm Co., American Fire Dispatch, Inc., Central Alarm (Tucson), Central Station Alarms, Inc., and Dayton Electronics Alarm & Signal, Inc. furnish none of the automatic fire alarm services; Fidelity Electronic Protective Services furnishes no waterflow alarm or sprinkler supervision services; Alarm Signal Co. of Texas, American Fire Dispatch, Automatic Alarm, Central Alarm (Phoenix), Central Alarm (Tucson), Denver Fire Reporter & Protective Co., Fidelity, Granite State Alarm, Inc., Morse, National Protective Corp. and Pacific Fire Extinguisher Co. furnish no watchman's reporting or manual fire alarm services, and many others furnish no holdup alarm services, no smoke detection services, none of the industrial process supervisory services, and so on. Concededly, when they are provided "the different forms of central station service are provided from a single office", as the Government states (Br., p. 47), but it fails to mention that the devices used for each service are wholly different, they are connected to separate transmitters and circuits or wires running to the central station, and the signal-receiving equipment maintained there differs from one service to the next, as does the type of response furnished. (See ADT's Brief, pp. 46-53)

demand for the other, they cannot be joined together for purposes of determining power to control price or competition as to any one or all of them.

To illustrate, many but not all companies manufacturing and selling sporting goods include a broad variety of different end use equipment in their lines, and all of these lines together can be and are denominated as the sporting goods business. Suppose that one of these concerns sells 87% of the total dollar volume of all sporting goods lumped together (baseballs, bats and gloves, golf balls and clubs, tennis rackets and balls, basketballs, footballs and equipment, and so on). Suppose further that this same concern, however, sells only 10% of the total dollar volume of golf balls while others, even though manufacturing and selling only golf balls, command 15% or more of the sales of that particular product. Upon the Government's theory, the concern with 87% of all sporting goods sales would have monopoly power in the sale of golf balls as well as all its other products. The fact is that while 87% of the overall business in sporting goods may be highly pertinent and determinative for purposes of the "line of commerce" inquiry required under Section 7 of the Clayton Act (*cf. A. G. Spalding & Bros., Inc.* v. *FTC*, 301 F. 2d 585 (3rd Cir. 1962)), it has no competitive, economic or legal significance when the question is monopoly power.

This unsupportable joinder in a single market of diverse and unrelated services directed to wholly different end uses is simply additional evidence that the District Court jettisoned the controlling standards of *Cellophane* and substituted merger case market tests. Because it refuses to recognize the fact that the ultimate issue is power over price or competition, the Government also is forced to rely solely upon merger cases[5] (where entirely different issues and standards are involved[6]) to support its contention that products and services furnished by the same companies are

5. *United States* v. *Philadelphia National Bank*, 374 U. S. 321 (1963); *United States* v. *First National Bank and Trust Co. of Lexington*, 376 U. S. 665 (1964).

6. See ADT's Brief, pp. 37-43.

in the same market for monopoly purposes, no matter how unrelated or distinctive they are in terms of end use and all other competitive criteria. Simply stated, by the Government's standard, pork and beans and pickles are in the same market because Heinz sells both from the same kitchens.

III

THE GOVERNMENT OFFERS NO VALID RATIONALE FOR THE CONCLUSION THAT THERE IS A NATIONAL MARKET IN ACCREDITED CENTRAL STATION SERVICES.

The Government's efforts to support the District Court's conclusion that there is a nationwide market in services furnished by accredited central stations are equally faulty and for the same reasons, *i.e.*, the findings and the evidence afford no basis for reaching any such conclusions where, as here, the issue is the power over price or competition essential to any finding of monopoly power. The court below and the Government here rely only upon the fact of ADT's multi-market operations[7] and totally ignore the

7. The Government states that "the business of providing [accredited central station] service is operated on a national level." (Br., p. 64) This is clearly not true of any company other than ADT and even the fact that it accounted for 73% of revenues in 1961 through operations in 115 cities does not make the nature of the business national (if ADT operated in only 5 cities and had but 5% of total revenues the nature of the business and its operations would be no different). In addition, the Government inaccurately portrays even ADT's operations. For example, the Government asserts (Br., p. 66) that ADT "engages in national advertising (GX 7, R. 1181)." The exhibit cited, however, merely says that the ADT parent company provides services to its operating companies and lists "advertising" without any suggestion that such advertising is anything more than the classified telephone directory ads which the record shows all alarm companies use and promotional folders for local distribution to prospects. The Government also argues (1) that the District Court's finding that "the system of accredited CSPS rests upon * * * even, on occasion, * * * national special discount prices to a particular customer who operates multi-state enterprises" (FF 40, R. 755) is "fully supported by the record" and (2) that ADT "deals with

uncontested facts of record which demonstrate that competition and market power can be ascertained only on a city or locality basis.

As set forth in ADT's brief (pp. 22-37) and unchallenged by the Government, central stations can furnish their services only in closely circumscribed areas not exceeding 25 miles at the most; central stations cannot compete with central stations or other forms of protection in other cities; subscribers can use the services of central stations located only in their particular city or locality; central station costs, prices and competition[8] vary most

large firms operating a multi-state business through their main offices, and negotiates nationwide contracts with such businesses covering numerous installations (R. 417-18)" (Br., pp. 64-65) The testimony of the witness cited and all the other evidence of record show that ADT deals with such concerns partially through their main offices in response to their requests to do so. But each location is dealt with on an individual basis, with the survey and price estimate made by local ADT personnel and with prices quoted reflecting the competition at the local level. Competitors regularly bid on and win such business and ADT consistently has to reduce its prices to meet their local competition. And the District Court's finding does not say that ADT grants national discounts and the evidence affirmatively establishes that it does not. (See, *e.g.*, R. 417-19, 424; GX 206, R. 1963; GX 214, R. 2021-22; GX 261, R. 2115-16; I. R. 3270-71; GX 177, p. 30; GX 179, pp. 50, 61, 63, 65, 68, 72-73, R. 1690, 1693, 1695; GX 180, pp. 37-38, 48-49, 54, 59, 60, 64, R. 1711, 1713; GX 181, p. 7; GX 182, pp. 16, 63; GX 184, pp. 31, 38-39, R. 1778; GX 185, p. 1; GX 186, pp. 27, 31, 48; GX 187, pp. 32, 39, 50; GX 188, pp. 15, 24, 54, 58, 61-62; GX 191, pp. 4, 7, 10, 16, 21, 24, 62; GX 192, pp. 17, 42, 45, R. 1862-63; GX 193, pp. 1, 3, 15, 33-34, 38, R. 1864; GX 195, pp. 17, 19, 34, 40-41, 47, 64; GX 197, pp. 9, 13-14, 20-21, R. 1904-05; GX 198, pp. 17, 19, 21-22; GX 200, p. 2; GX 202, pp. 29, 67; GX 203, pp. 10, 16, 33, 36-37, 60, 66-67)

8. The Government notes that "ADT sets uniform prices—the so-called minimum basis rates—for the country as a whole. * * * Deviations from these system rates were permitted to meet individual competitive situations, and ADT, in its total operation, was able to obtain a high percentage of its minimum charges (GX 222, R. 2033-38)." (Br., pp. 64-65) The very exhibit cited by the Government shows, however, that price levels have varied by as much as 60% from one city to another, that in the more than 1200 city-by-city experiences achieved between 1957 and 1961 the average rate actually achieved deviated from the MBR target in all but 11, and

substantially from city to city; insurance treatment for central station services varies from one area to another; and all other aspects significant to power over price and competition are highly localized.

The fact that ADT must and does vary its prices in response to the many different cost and competitive situations peculiar to each city where it operates proves neither that the market is nationwide nor that there is monopoly power.[9] For example, a "national" brewer may hold 10% of total national beer sales and may dwarf regional and local brewers in terms of total dollars of sales, assets and overall size. But even though the regional and local brewers may account for but a fraction of 1% of national sales, individually they may account for 30% to 40% of sales in their particular locality where the national brewer's sales, even if at the 10% level, rank him third, fourth or fifth in that local market.

While the national brewer has to respond to the local cost, price and competitive considerations, with the result that his prices in one local market are lower than those he can obtain in another, this is not evidence of monopoly, even where presumably his operations elsewhere could subsidize his embarking upon a predatory pricing program to undercut his regional and local competitors in a particular local market. This is true because monopoly presupposes the power to vary one's prices over a substantial range of *profitable* alternatives. (See p. 16, *infra*) Consequently, lacking any significant cost or preference ad-

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that different levels of prices were almost as numerous as the number of cities served. Elsewhere (Br., p. 22) the Government concedes that this exhibit confirms radically divergent price levels from one city to another and declares, "The extent of the differences naturally varies from city to city. * * *" The reasons it "naturally varies" are the markedly different cost, competitive and other factors unique to each locality which govern the levels of price obtainable.

9. The Government's contentions (see pp. 17-25, *infra*) that ADT finances price-cutting activities in cities where it faces competition from accredited central stations with profits from "monopoly" cities are demonstrably incorrect. But, concededly, prices do vary from place to place and this just highlights the local character of the market.

vantage over its regional and local competitors, the national brewer does not have monopoly power in the local market.

Here there is not even a contention, let alone evidence, that the defendants or ADT have any such cost or preference advantage affording them the range of profitable alternatives which allow a monopolist to elect that level of price and volume of production which maximize profits for him. Instead, the Government's own evidence shows only that the defendants must react to varying price levels in each different locality.[10]

IV

THE GOVERNMENT ATTEMPTS TO RE-WRITE *CELLOPHANE* TO JUSTIFY CONSIDERING ONLY PRODUCT OR SERVICE DIFFERENTIATION WHILE IGNORING THE UNCHALLENGED EVIDENCE OF CROSS-ELASTICITY AND THE ABSENCE OF PROOF THAT DEFENDANTS HAVE THAT POWER TO VARY THEIR PRICES OVER A SUBSTANTIAL RANGE OF PROFITABLE ALTERNATIVES WHICH IS ESSENTIAL TO MONOPOLY.

While the Government, unlike the court below, nominally recognizes that the "reasonable interchangeability or cross-elasticity of demand" test of *Cellophane* controls market definition in a Section 2 case, its analysis of that decision reveals either misunderstanding or an effort to re-write the standard articulated there. The Government's argument essentially reduces itself to three points, all erroneous: (1) that the interchangeable products must be virtually identical, (2) that this identity must exist regardless of whether there is cross-elasticity of demand, and (3) that

10. The Government's reliance (Br., p. 66) upon *United States v Griffith*, 334 U. S. 100 (1948), is misplaced. That case involved the use of monopoly power in one local market to restrain competitors and to monopolize other local markets where the defendant had no monopoly.

the cross-elasticity itself must be of a very high order of magnitude.

First, the Government says that *Cellophane* requires that differences between products, if they are to be included in the same market, must be so minor that the customer "is relatively indifferent as to which product he uses." (Br., pp. 33, 44) This, however, is precisely the same argument urged by the Government in *Cellophane* and rejected by both the majority and the dissenters (351 U. S. at 394, 416). In *Cellophane*, the Government argued that products must be "substantially fungible" to be considered in the same market in a monopoly case. Its brief explained what was meant by this term:

> "By the words 'substantially fungible,' we mean simply that a product is so closely similar in function and characteristics to another product that it is, for all practical purposes, *immaterial to the user whether he obtains one or the other.*" Government's Brief, No. 5. October Term, 1955, p. 72, n. 58.

This Court in *Cellophane* properly rejected the argument. Clearly, for example, it is not immaterial or a matter of indifference to the purchaser of a car whether he buys a Ford or a Chevrolet, and yet the two makes unquestionably compete.

The second misreading or re-writing of *Cellophane* is evident in the following passage:

> "* * * it is only where there is a low degree of product differentiation *and* a high degree of shifting from one product to the substitute in response to price changes (or, as the economists call it, high cross-elasticity of demand), that market shares of the product which is the subject of the alleged monopolization may not be assumed to reflect the producer's power to fix prices or eliminate competition." (Br., pp. 44-45)

The Government thus urges that *Cellophane* imposes a dual requirement of "a low degree of product differentiation" in combination with "high-cross-elasticity of de-

mand", apparently suggesting that if either is lacking substitute products can be disregarded in determining power over price and competition in the allegedly monopolized product. The fact is that "product differentiation", high or low, is determined solely by the judgment of customers[11] and will be mirrored in the degree of cross-elasticity which exists.[12] That alone is the inquiry.

Proceeding from its argument that "product differentiation" alone excludes substitute products from the relevant market, the Government urges that *International Boxing Club* v. *United States*, 358 U. S. 242 (1959), justifies Judge Wyzanski's conclusion that services furnished by accredited central stations are "a sufficiently separate part of the trade or commerce to constitute the relevant market for Sherman Act purposes." (Br., pp. 44, 46) If *International Boxing* guided the court below, that only confirms Judge Wyzanski's express statement[13] that he discarded the whole concept of cross-elasticity and ignored the evidence of its existence here. This is true because in *International Boxing* there was neither evidence nor, indeed, even argument by the defendants (as the briefs before this Court demonstrate[14]) that there was any price interrelationship, responsiveness or sensitivity between championship and non-championship boxing bouts. No issue as to the existence of cross-elasticity of demand was even raised, the defendants urging only that there were obvious similarities between the two types of contests. On such a rec-

11. Inquiry is properly directed not to how "highly differentiated" substitute products are but rather, as the Government appears to concede elsewhere (Br., p. 43), to how "closely acceptable to consumers they are."

12. As economists state the concept, "cross-elasticity reflects the extent to which price changes in one product affect the amount of another product that buyers will buy. Where the cross-elasticity of demand for rival products is great, a decline in the price of one decreases the sale of the other and *may* lead to a decline in price." Stocking, *"The Rule of Reason, Workable Competition and Monopoly,"* 64 Yale L. J. 1110-11 (1955).

13. *E.g.*, R. 393, 544, 432-42.

14. No. 18, October Term, 1958.

ord, this Court had to hold that *Cellophane's* test of "reasonable interchangeability or cross-elasticity of demand" was not met and championship bouts were therefore "a sufficiently separate part of trade or commerce" to constitute the market.

Here, on the other hand, not only is the record replete with evidence that customers similarly situated in all respects pertinent to selection of a protection service or system are solicited by and make different elections among those services furnished by accredited central stations and other effectively competing forms of protection, but also there is the most substantial proof of marked price interrelationship, response and sensitivity between them. (See ADT's Brief, pp. 119-31, 2a-20a) Like the decision of the District Court, the Government's 125 page brief here never even mentions this evidence, even to argue that at most it shows only insignificant cross-elasticity. The Government is thus compelled to urge that, contrary to the test of *Cellophane,* the court below properly ignored and avoided the evidence of substantial cross-elasticity on the ground of allegedly "high product differentiation" alone.[15]

Finally, the Government further re-writes *Cellophane* in declaring that unless "high cross-elasticity of demand" exists "market shares of the product which is the subject of the alleged monopolization may * * * be assumed to reflect the producer's power to fix prices or eliminate competition."[16] In fact, the Government implies that by the

15. ADT's brief deals in detail with the differences and alleged differences between accredited central station services and other forms of protection. (See pp. 62-116) Here, in the Appendix to this reply brief, we deal only in summary form with some of the Government's arguments in this area.

16. Recognizing that the District Court inferred monopoly power solely upon the basis of its market definition and percentages, without any other finding or evidence that the defendant alarm companies have the power to control price or competition, the Government argues that if the market definition and shares found below are valid such percentages alone may "be assumed to reflect the producer's power to fix prices or eliminate competition." Elsewhere in its brief the Government is less positive: "The existence of such power [to

standard of *Cellophane* substitutes must be "so closely acceptable to consumers of Product A that even a slight increase in the price of that product will lead *all* of them to shift their patronage to the substitutes. * * *" (Br., p. 437) This is not the law. As this Court held in *Cellophane* and has consistently confirmed since, the test is merely "reasonable interchangeability of use or cross-elasticity of demand." *United States* v. *Continental Can Co.*, 378 U. S. 441, 452 (1964); *Brown Shoe Co.* v. *United States*, 370 U. S. 294, 325 (1962). The evidence adduced by defendants here meets that test.

Upon the evidence of cross-elasticity here, the Government has an additional burden. As the Government's own counsel has elsewhere stated, "once the defense puts in its evidence of substitutability, the Court [in *Cellophane*] clearly puts on the Government the burden of introducing comparative cost-and-profit data sufficient to establish the power to exclude competition when it is desired to do so." This is so because the majority in *Cellophane* (emphasizing the Government's failure to show "that du Pont's rate of return was greater or less than that of other producers of flexible packaging materials"[17]) indicated a different

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control prices or exclude competition] *ordinarily* may be inferred from the possession of a predominant share of the market. Sustained occupancy of a predominant position in a significant and separable market is strong evidence of power to control prices or to exclude competition." (Br., p. 41) The legal authority cited for the Government's argument is Judge Hand's much-cited statement in *United States* v. *Aluminum Co. of America*, 148 F. 2d 416 (2d Cir. 1945), that possession of 90% of the sale of virgin aluminum constituted monopoly power in that part of commerce. As set forth in ADT's main brief (pp. 136-40), respected economists of all persuasions agree that monopoly power cannot be inferred merely upon the basis of the percentage even of a validly defined market, and they expressly criticize *Alcoa* on this ground. Among these authorities, eminently qualified in the disciplines of both economics and the law, is Donald F. Turner, the present Assistant Attorney General in charge of the Antitrust Division, whose name appears on the brief of the Government here. Economists have significantly advanced and improved the state of their learning and have markedly improved the means for determining and measuring market power since Alcoa was tried and determined.

17. 351 U. S. at 426.

result would have been reached "had the Government made such a showing, demonstrating that despite the presence of reasonably interchangeable substitutes, du Pont had a wide range of profitable price and output choices" attributable to "a substantial cost advantage." TURNER, "ANTITRUST POLICY AND THE CELLOPHANE CASE," 70 HARV. L. REV. 281, 302-03, 308-09 (1956).

Not only has the Government failed to show or even argue that the alarm company defendants have any such cost advantage, but it also presents this Court with a record wholly barren of any cost-price comparisons with other concerns furnishing either services from accredited central stations or other forms of protection, and the sole profit evidence of record shows that ADT's profits are in no way consistent with the existence of monopoly power. (See ADT's Brief, pp. 145-146)

In such circumstances, monopoly power on the part of the defendants cannot merely be inferred on the basis of the District Court's purely mechanistic market definition and percentage approach. As economists and this Court recognize, the hallmark of monopoly is the ability of the monopolist to vary his prices over a substantial range while realizing a profit through both extremes of that range of alternatives available to him. Thus, "* * * monopoly power is the power to vary one's price within a substantial margin —a choice of profitable alternatives—and, correspondingly, the power to exclude competitors entirely or to a substantial extent when it is desired to do so." TURNER, "ANTITRUST POLICY AND THE CELLOPHANE CASE", 70 HARV. L. REV. 281, 288 (1956). Or, as the dissenters in *Cellophane* declared, "a monopolist has a considerable degree of latitude in determining which course to pursue in attempting to maximize profits."[18] (351 U. S. at 422)

18. Even the Government here appears impliedly to recognize that an alleged monopolist's available choices of a profitable price must encompass a substantial range, for the Government urges that the congressional policy behind Section 2 is to deal with that seller who "can, to a significant degree, ignore substitutes in fixing his prices. * * *" (Br., p. 45)

On the record here and in the light of such controlling considerations, there is absolutely no basis for inferring that defendants have the power to control price or competition in the services furnished by accredited central stations, and the District Court's conclusion of monopoly power based solely upon erroneous market definition and percentages must fall.

V

THE GOVERNMENT'S CONTENTIONS AS TO ALLEGEDLY RESTRICTIVE AND EXCLUSIONARY PRACTICES BY THE ALARM COMPANY DEFENDANTS

The Government urges that the alarm company defendants have engaged in certain "restrictive and exclusionary practices" which, when considered with the monopoly power the Government asserts they have, are sufficient to sustain the conclusion that they have monopolized in violation of Section 2. It is defendants' position that monopoly has not been proved and that therefore even predatory or anticompetitive conduct, if validly established, would not constitute monopolization. Moreover, the District Court found monopolization solely upon a presumption, predicated solely upon its erroneous market definition and percentages. We deal briefly, however, with certain of the Government's contentions, not solely because they are erroneous but primarily because the evidence pertinent to them is contradictory of the market definition found below and the existence of monopoly power.

A. Pricing Practices

The Government argues at length that in cities where it has accredited central station competition ADT has deviated from its target prices or so-called Minimum Basic Rates "where necessary to meet competition" and for the purpose of "keeping competitors out," while charging higher prices in cities where it has no accredited central station competition. (Br., pp. 19, 22-24, 76, 78) The Gov-

ernment ultimately concludes "that ADT has been financing its price-cutting activities in competitive cities from its higher charges in monopoly areas." (Br., p. 78)

Pricing of central station services, as well as other forms of protection, departs substantially from the pricing of most other products and services. The District Court found:

> "When a prospective subscriber requests CSPS service, the service company surveys the subscriber's premises, determines the number and type of required protective devices, and estimates the cost of needed equipment and labor plus overhead expenses and often expected profit, all of which are usually used in computing an 'installation charge.'[19] This charge is normally payable upon completion of the installation. Additional 'annual service charges', usually payable periodically in advance, and calculated with reference to the equipment in service, telephone line rental costs, expected service including maintenance costs, and often expected profit, are also charged to the subscriber. Annual service charges are covered by contracts for periods of up to five years. * * *" (FF 6, R. 748)

19. Unlike other central station companies, ADT obtains an "advance service charge" rather than an installation charge in connection with its initiation of service. Contrary to the Government's assertions (Br., pp. 79, 90), as the language quoted above shows, the court below did *not* find that upon its installation of the system of devices and equipment at the subscriber's premises, ADT's advance service charge "ordinarily covers the cost of labor and equipment and the overhead, and also provides a profit. * * *" The uncontradicted evidence is that ADT does not recover all of its costs of installation with its advance service charge. On a system-wide basis, advance service charges represent less than 65% of ADT's bare costs of installation (direct labor and material), plus certain supervisory costs. (R. 229, 555-62) The fact is that ADT treats its advance service charges and annual service charges as together designed to start producing a profit at some point during the normal period that the system remains in use. As ADT's Minimum Basic Rate (MBR) schedules distributed solely for internal use state, "These minimum basic service charges are calculated to produce a modest return over that period of years which represents the average revenue-producing life of the installations rather than the primary contract term." (E-1, E-2, R. 3246-50)

Witnesses from competing alarm companies uniformly testified that each installation and the ensuing service involve radically different costs owing to problems unique to each subscriber's premises and circumstances.[20] Even where the same type of service is involved, installation and service charges must involve significant judgment and discretion because each contract turns upon a "tailor-made" situation. (Witnesses testified that even two employees of the same company would arrive at different estimates for a single prospective customer.)[21]

On the basis of its system-wide overall cost experience, ADT has attempted to develop measuring guides for estimation of its charges for each service. Based upon units, which vary from one service to another, it projects target or MBR price levels for use by its sales personnel. As the MBR schedules state, "they are intended to apply only under ideal conditions and circumstances affecting the installation, operation and maintenance of service." When circumstances other than normal are encountered in the installation or servicing of a particular subscriber, these target rates must be increased. The MBR schedules expressly recognize that

> "so many variables are encountered in the installation, operation and maintenance of our services that it is not practicable to establish a single charge that would apply in all cases with equal fairness. Accordingly,

20. Differences are caused by variations in building construction (steel, concrete, wood), layout (widely scattered devices requiring long wire runs to connect), physical conditions (erratic heat source, unusually high ceilings, corrosive atmospheres), and the nature of the subscriber's business and use of his premises, all of which, along with many other differing factors (some not ascertainable until service is initiated) vary the costs of installing systems and furnishing services and make complicated the estimating of prices necessary to cover costs.

21. *E.g.*, GX 320, p. 145, R. 2486; GX 326, pp. 78, 122-23, R. 2579, 2594; GX 330, p. 22, R. 2717; GX 333, pp. 38-39, 74, R. 2810-11, 2826; GX 334, p. 17, R. 2848; GX 336, pp. 26-27, R. 2863-64; GX 337, pp. 48-51; GX 342, pp. 37-40, R. 2953-55; GX 343, pp. 47-48, R. 2965-66. See particularly, such testimony as that contained at GX 345, pp. 24-32.

> these minimum basic service charges must be modified to give proper weight to all unusual elements and conditions. Sales representatives will be expected to recognize every installation that is apt to present peculiarities involving abnormal installation, operation and maintenance costs, to procure a Plant Department estimate of the cost to install in each such case, and to be guided accordingly—quoting annual and advance service charges." (E-1, E-2, R. 3246-50)

As the Government states, since at least 1955 ADT has required its salesmen to submit "Competition Reports" (Forms 701) showing all deviations from the target or MBR rates. Between 1955 and June 25, 1963, approximately 33,500 of these reports have been filed. In 14,159 instances they specifically identify both a competitor and the particular kind of service with which ADT had to compete in offering its central station services. (R. 433-37) From these forms, the Government originally selected and introduced at the trial many hundreds. Here the Government has made a further selection, including in the printed record some 300 such forms. (GX 175-203, R. 1629-1959)

To support its argument that the defendants or ADT have engaged in pricing which is allegedly "restrictive and exclusionary", the Government points to some 60 of these selected forms. Significantly, the Government nowhere contends that ADT's competitive price reductions undercut the prices of its competitors. In fact, ADT authorized its salesmen to do no more than meet competitive price offerings.[22] (R. 399-406, 607-15; AE, R. 3995-98; GX 212, R. 2013-19) Consequently, no matter how "substantial" the Government urges the reductions were, they were respon-

22. Without citation of evidence, the court below found that on occasions, "rare though they were, the departures undercut or beat competitors' prices." (FF 55, R. 760) It would be astonishing, indeed, against the background of more than 33,000 negotiations evidenced by the Forms 701 had there not been an occasional instance of undercutting. Any evidence of such "rare departures", without any suggestion that they were knowing and wilful, affords no basis for any inference of predatory conduct.

sive to and at most on a parity with competitive price offerings, as examination of the forms demonstrates. That in some instances the forms include expressions by salesmen of the obvious fact that the reduction, where ADT won the account, "kept the competitor out" in no way demonstrates that the reductions were "exclusionary" in any sense other than that when one competitor gains a customer another is to that extent "kept out".[23]

The Government relies upon these ADT competition reports to argue that defendants have monopolized the narrow accredited central station market found by the District Court by engaging in "restrictive and exclusionary practices." But a most significant aspect of the reports is the fact that many of them show that the competition which compelled ADT to reduce its prices came from other forms of protection outside that "market". Even the forms selected by the Government for mention in its brief here

23. The Government contends that in "numerous instances" ADT "made the installation without charge, reduced the annual service charge by 50 to 70%, or even sometimes accompanied such reduction in annual charges with a free installation." (Br., pp. 19-20) The Government's characterizations greatly overstate the District Court's findings; Judge Wyzanski found only "frequent quotation * * * less than 100% but *not less than 80%* [of annual MBR], *occasional* installation without charge * * * and *infrequently*, the deferment of prompt payment of installation charges." (FF 55, R. 760) Examination of the Forms 701, both those cited and not cited by the Government, however, evidences the fact that against total transactions such instances have been far from numerous. Further, the forms on their face show that such reductions at most matched those quoted by competitors. Finally, where advance service charges were reduced or not initially charged, they were amortized over the life of the contract and were reflected in an increase in the annual service charge which would otherwise have been quoted. ADT's MBR schedules expressly provide that when "it becomes necessary to amortize the advance service charge 1% shall be added to the amount amortized for each year of the contract term." (E-1, E-2, R. 3246-50) And witnesses from competing alarm companies freely testified that they, too, reduce or initially waive their installation charges where necessary, recovering such investment over the life of the contractual relationship with the subscriber. (*E.g.*, GX 319, pp. 16-17, R. 2426-27; GX 320, p. 66, R. 2468; GX 324, p. 30, R. 2512; GX 326, pp. 28, 108-10, R. 2559, 2589-90; GX 334, p. 13, R. 2847; GX 357, pp. 14-16)

have reference to other than accredited central station concerns.[24]

Moreover, if all of ADT's competition reports for the 1955-1963 period are examined, they show that in those instances where a competitor and his form of protection were specifically identified the competition which ADT met in 3,678 instances was other than accredited central station.[25] In these transactions, which the Government urges and the court below found are non-competitive and outside the "relevant market", ADT lost 1,095 or 30% of these transactions to "non-competitors" and obtained the business in the remaining 2,583 solicitations only by reducing its prices (as the filing of the Form 701 demonstrates) in response to such "non-competitive" offerings.[26] (R. 433-37; F. 69-70, F. 75-76, R. 3294-98, 3309-465) Contrary to the Government's contentions, these instances of "non-competitive" competition evidence the marked cross-elasticity of demand between accredited central station services and other forms of protection.

The Government also uses its selection of ADT's competition reports to argue that while ADT "substantially cut its charges to meet competition, it renewed a number of contracts at substantially increased rates in cities where

24. *E.g.*, R. 1646, 1754, 1801, 1802, 1810. Of the some 300 forms selected by the Government for inclusion in the printed record here, even quick examination shows many additional instances in which ADT's price reductions were in response to forms of protection other than accredited central station services. *E.g.*, R. 1691, 1704, 1781, 1802, 1804-12, 1814, 1816, 1886-87. For confirmation that these competitors were not accredited central stations, reference may be had to GX 305, R. 2222 and D75(b), R. 4507-08, which list the dates on which central stations have become accredited.

25. During the same period, the number of instances where a competing accredited central station was specifically identified was 10,481. (R. 434-35)

26. As noted in ADT's Brief (p. 123, n. 153), these figures understate the number of instances in which such competition from other than accredited central stations was encountered, both where ADT was forced to lower prices and otherwise, because the salesmen have frequently failed to report those instances in which they failed to win the contract.

it had a monopoly of accredited central station business." (Br., p. 22) Apart from the fact that many of the competition reports, as noted above, expressly identify the competitors who compel price reductions as offering forms of protection other than accredited central station service and that others show reductions at places and times where and when ADT had no accredited central station competition, the Government's citation of competition reports in alleged "monopoly" cities is hardly persuasive. For the Government has simply selected and re-selected the particular competition reports upon which it chooses to rely, and they represent a small fraction of the total. Those contained in the printed record here have been obviously selected to show only increased prices or prices above the target rates in any "monopoly" city. Conversely, in any city where ADT has a competing accredited central station, only price reductions and prices below the target rates are shown. The whole picture is shown by other evidence, now discussed.

Turning from the competition reports, the Government looks at GX 222 (R. 2033-38), which for each of the years 1957 through 1961 sets forth the annual average percentage of the target rate or MBR achieved in each of the 115 cities where ADT has an accredited central station. From various tables it has compiled (Br., Appendix, pp. 119-24) based upon this information, the Government argues that "ADT was able to obtain a significantly higher overall percentage of its basic charges in cities where it had no accredited central station competition than in cities where it had such competition" and therefore that "ADT has been financing its price-cutting activities in competitive cities from its higher charges in monopoly areas." (Br., p. 78) This conclusion will not withstand analysis.

Assuming *arguendo* that the Government's figures were representative,[27] it would require broad assumptions, un-

27. In fact, they are not. For example, the Government has included only 22 cities in its "non-monopoly" grouping, excluding therefrom such cities covered by GX 222 where ADT does have accredited central station competition as Pittsburgh, Camden, St.

supported by any evidence of record, to conclude from them that any lower percentages of MBR in "monopoly" cities have been financed by higher percentages of MBR in "non-monopoly" cities.

It must be assumed that cost levels in the "non-monopoly" cities do not account for any higher percentage of MBR achieved there and that rates of profit are higher there than in "monopoly" cities. In fact the costs of furnishing central station service vary radically from city to city, as indeed they do for other forms of protection as well. (See ADT's Brief, pp. 28-29) Further, the District Court found that ADT has continuously incurred deficits in 20 "monopoly" cities. (FF 47, R. 756-57; PP, R. 3809)

More specifically, as of 1961 ADT derived 66.1% of its central station revenue from the 34 cities where it faces accredited central station competition (as against 33.9% from the 81 "monopoly" cities[28]) and 69.3% of its net earnings from such revenue came from "non-monopoly" cities (as opposed to the 30.7% of such earnings attributable to the 81 "monopoly" cities). The average rate of return on revenue (before taxes) was 12.44% on ADT's "monopoly" city stations and 14.37% on those in the "non-monopoly" cities.[29] (R. 237-38) These figures show that ADT's "non-monopoly" stations not only do twice as much

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Paul, Long Island City, Oakland, Mineola, and so on. (R. 2673-74, 2668-73, 2844, 2858, 2888, 2914) Actually, there are 34 cities where ADT has accredited central station competition, some of those competing stations being located in adjacent cities within the range necessary even for insurance—approved service (*e.g.*, a competitor in Dallas also serves Fort Worth and ADT has stations in both cities, R. 3082). Many of these excluded "non-monopoly" ADT stations achieved higher percentages of MBR than those selected by the Government.

28. The District Court's figure of 92 cities is computed upon the basis of whether competing accredited stations are physically located in the same city with ADT's station. (FF 7, R. 748)

29. These figures are from the Brief of Defendant Alarm Companies With Respect to Relief, admitted as Exhibit D by Judge Wyzanski in lieu of evidentiary presentation which he urged defendants to forego. Counsel for the Government stated it had no objection. (R. 377-78)

business but realize a higher rate of profit and achieve a dollar net yield more than twice that of its "monopoly" stations.

Consequently, the Government's laborious computations do nothing to support its conclusion that "ADT has been financing its price-cutting activities in competitive cities from its higher charges in monopoly areas." Rather the only conclusion that can be drawn from GX 222 or any other evidence in the record is that, as the Government itself declares (Br., p. 23), within either the "monopoly" or "non-monopoly" groups of stations, "The extent of the differences [in the percentages of MBR or target rates realized] naturally varies from city to city." It "naturally varies" because varying local cost and competitive factors control the prices ADT can obtain. If it had monopoly power it would achieve the target rates it seeks at least in the "monopoly" cities, and not even the Government claims it does that. Rather the fact is that ADT meets effective competition in "monopoly" cities from forms of protection other than services furnished by accredited central stations.

Considering that the facts set forth above as to ADT's deviations from its MBR target rates are the only basis for the District Court's conclusion that "the alarm company defendants resorted to restraints of trade prohibited by Section 1 of the Sherman Act when, faced with competition, they, being in a dominant position, manipulated their own prices to forestall competition" (CL 4, R. 761), we submit that conclusion cannot be sustained. Further, absent the "conspiracy" or agreement requisite to a Section 1 violation, we fail to see how even proven predatory pricing can constitute a violation of that statute.[30] As noted in ADT's Brief (p. 158), there is no evidence that ADT's unilateral pricing, whether predatory or not, was pursuant to agreement with any other party.

30. In its statement of the District Court's decision, the Government notes that it "held that the alarm company defendants had committed *per se* violations of Section 1 of the Sherman Act by * * * manipulating their prices to forestall competition." (Br., p. 30) But in its argument that ADT's pricing was "restrictive and exclusionary" it urges only that this is evidence of monopolization, not a Section 1 violation. (Br., pp. 76-79)

B. Acquisitions

The Government argues that since 1907 ADT has acquired "27 companies engaged in the business of providing fire or burglar alarm protection service" (Br., p. 75), but must concede that the District Court found that only two of ADT's acquisitions were accredited central stations and the others "admittedly were not in the market directly at issue in this case." (FF 50, R. 757) The Government urges that these acquisitions outside the market gave ADT "a base from which to build, and also blocked the development of potential competitors" who otherwise might have "gradually moved into the superior central station service." (Br., p. 75)

First, there is no evidence that ADT "built" any one of these acquisitions into an accredited central station. Second, even if the mere assumption that the acquired concerns might have "gradually" become central stations on their own were proved, it would be without significance because the roughly 20 acquisitions must be compared with the literally hundreds of such "companies engaged in the business of providing fire or burglar alarm protection service" which the record shows to exist across the country. These hundreds of other companies, with the same potential, dwarf any argued competitive impact attributable to ADT's acquisitions. Further, the District Court held that there is no evidence that any "prospective entrant [to the accredited central station business] has been unable to begin operations." (FF 45, R. 756)

Finally, the District Court did not adopt any such speculative theory as the Government urges. Rather the erroneous and illogical rationale articulated by the court was that defendants have an "overwhelming share of the accredited CSPS business" and that "acquisitions, both within and outside the relevant market, were important sources of the market power achieved by the alarm company defendants" because "the acquisitions indicate that ADT's growth * * * owes more than a little to the special kind of appetite which has characteristically revealed a monopolistic tem-

per and explained a monopolistic growth." (FF 48, 50, R. 757-58) These acquisitions may have contributed to ADT's "growth" overall but not to its "growth" or "market power" in any market limited to accredited central station services.

The Government also urges that the sellers of these acquired companies "executed long-term covenants not to engage in the *protective service business.*"[31] (Br., p. 75) These typical non-compete covenants, as the Government apparently recognizes, covered forms of protection far broader than accredited central station service, evidencing the fact that ADT has always known its competition is not limited to that form of protection. If the challenged acquisitions have any competitive significance, it is solely in demonstrating that the market found below is unrealistically and erroneously confined only to accredited central station services.

C. Threats Against Actual and Potential Competitors

The Government argues at length that "on occasion" and "sometimes" ADT's "representatives have threatened retaliation against firms who contemplated inaugurating central station service" (the Government does not say whether it means "accredited" central stations). (Br., pp. 24-26) The District Court, however, rejected findings proposed by the Government to this effect[32] and found instead that there was no evidence any prospective entrant had been unable to begin operations or that any CSPS firm had failed or been driven out of business. (FF 45, R. 756)

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31. The Government cites GX 9, R. 1190; GX 12, R. 1195; GX 26-1, R. 1212; GX 26-2, R. 1214; GX 30-1, R. 1230; GX 32, R. 1235; GX 40, R. 1252-53.

32. Plaintiff's Request for Findings of Fact, pp. 28-31.

D. Opening New Central Stations to Discourage Competition

Similarly, the District Court refused to make findings proposed by the Government[33] to the effect that even "one factor that sometimes influenced ADT to [open 13 central stations between 1952 and 1961] was the effect such opening would have upon competitors," an argument the Government renews here. (Br., pp. 27-28) Coupled with the court's finding that prospective entrants have not been deterred, this disposes of the Government's argument.

What is demonstrated by the evidence, both the exhibits cited by the Government and the balance of the record, is that defendants have decided whether or not to open central stations on the basis of ordinary business principles such as growth of a municipality, industrialization of suburban areas, over-loading of existing central station facilities, the needs of old subscribers opening new establishments and the desire to secure an overall reasonable profit.[34]

E. Allocation of Markets

The Government also relies upon the agreements dating back to 1907 and earlier among the alarm company defendants (some but not all being parties to any one agreement) which the District Court concluded "allocated geographic markets and classes of customers" among them. (CL 2, R. 760-61) Not only those agreements themselves but the Government's description of them (Br., pp. 13-19, 72) demonstrate that they do not fit the market as defined below. They are in many of their provisions far broader than any central station service form of protection alone; where provisions deal with central station services they are not limited to services by accredited central stations; and none of them covers all of the diverse risks and hazards to which the multiplicity of services in the accredited central station

33. *Ibid.*, pp. 31-32.

34. R. 563-64; A7; A8; A13-A30; E37-E39; E41-E46; F1; F1a; F17; F18.

market found below are directed.[35] Again, these provisions demonstrate that defendants, in their conduct, never viewed the real market to be as found here.

VI

THE GOVERNMENT IS NOT ENTITLED TO ADDITIONAL RELIEF.

The Government argues on its appeal that the remedies fashioned in its favor by the court below are inadequate and seeks to have the case remanded "for further proceedings with respect to relief." (Br., p. 118) Specifically, it requests that this Court "hold that divestiture is appropriate", without determining what should be divested. (Br. p. 89) It requests that this Court direct the court below to limit the term of defendants' service contracts in some fashion and "explore" the possibility of requiring defendants to sell their equipment to their subscribers. (Br., pp. 90-92) Finally, it proposes that the defendants be required to sell their equipment on non-discriminatory terms to their competitors (Br., pp. 92-93) and that the trial court "be given an opportunity to reconsider" its refusal to grant the Government visitation rights. (Br., pp. 93-94) We submit, however, that the Government has failed to sustain its burden of showing that the trial court abused its discretion in denying these additional items of relief.

A. Defendants Have Not Conceded the Necessity for Additional Relief.

The principal argument advanced by the Government in support of its contentions seems to be that the defendants, in the course of pretrial proceedings, agreed different relief would be appropriate. The Government states that "[b]efore trial" the District Court directed the parties to set forth their views on appropriate relief should the Gov-

35. GX 61, R. 1312-15; GX 80A-C, R. 1362-86.

ernment's position on liability be upheld (Br., p. 83), and that in response to this direction the defendants indicated that they would accept relief more extensive than that ultimately ordered. The court's direction, however, came before a trial date had even been set and at a time when there was a possibility that it never would have to be set. It was clearly understood at the time by everyone that the various proposals made then were made in order to make a consent settlement more likely.[36] Accordingly, the Government as well as the defendants proposed a form of consent judgment. (R. 137; R. 151).[37] When Judge Wyzanski directed the parties to indicate their views on relief he likened the procedure to the ordinary "pre-trial settlement discussion". (R. 128-29) At the same time Government trial counsel referred to it as "Consent Decree negotiation" (R. 126) and just prior to the trial he again referred to "consent decree negotiations." (R. 278) Trial counsel for ADT

36. The briefs on relief were submitted in accordance with the procedures set forth in the *Handbook of Recommended Procedures for the Trial of Protracted Cases*, 25 F. R. D. 351, 398, which reads in pertinent part as follows:

> "There is a further advantage to be gained in discussions of relief. In civil antitrust litigations, where the government is the plaintiff, the case often proceeds to trial through lack of agreement as to (1) what relief would be appropriate were the allegations of the complaint proved in their entirety, or (2) *what relief the government and the defendants would be willing to accept in a consent decree. Discussion of these matters at pre-trial conferences may serve to dispose of the case without trial.* Although judges should be very circumspect in their efforts to persuade the litigants to settle, they need not sit by helplessly as the case moves inexorably toward protracted trial, where there is sound reason to believe that a calm discussion of the government's objectives may lead to a resolution of the differences between the parties in advance of trial. The same principles apply to other big cases where equitable relief is the principal issue."

Since neither contingency which prompted the defendants' submissions has come to pass—the Government's case was not proved in its entirety and the case was not settled—reference to these submissions now is clearly improper.

37. The Government's brief creates the impression that only the defendants proposed a consent judgment. (Br., p. 83)

and the other alarm companies referred to the period during which the statements on relief were prepared as the "settlement period." (R. 276)

The Government recognizes, as it must, that the proposals submitted to further settlement of the case are not binding upon the defendants or the District Court, but contends that they indicate "the defendants conceded the propriety of much of the relief sought by the Government." (Br., p. 87) They obviously do nothing of the kind. They indicate merely that the defendants were willing to make substantial concessions to the Government in order to avoid extensive litigation, possible adverse findings and consequent treble damage exposure.

Sound public policy favors the settlement of cases, and in support of that policy litigants are encouraged to make settlement offers without the fear that they will be later admitted against them. To hold, as the Government urges, that defendants' settlement proposals represent some kind of acknowledgment or concession would seriously undermine that policy.

B. The Proposed Procedure is Wasteful and Unnecessary.

The Government is not asking this Court tc frame a specific decree. Rather it is asking the Court to declare in the abstract for the guidance of the District Court that certain further remedies might be appropriate depending on the particular facts which it finds on remand. We submit, however, that the District Court has already considered these remedies and rejected them in the light of the specific factual situation with which it was confronted. There is no necessity for doing it all over again.

This is not a case like *United States* v. *E. I. du Pont de Nemours & Co.*, 353 U. S. 586 (1957), where it was necessary to remand for a hearing on relief because the court below, having dismissed the complaint, never reached the subject of relief. Nor is it a case where the court erroneously concluded as a matter of law that certain types of relief were unavailable.

In this case, the court specifically put the parties on notice that it would decide the issues of liability and of relief simultaneously. (R. 282-83) The Government had the opportunity to make as full a showing as it chose on the issue of relief. The trial court chose to grant some of the Government's requests and it chose to reject others. What the Government is asking this Court to do in effect is to direct a rehearing on this question. This is entirely unnecessary.

The decree entered below specifically provides:

> "Jurisdiction of this cause is retained for the purpose of enabling any party to apply to this Court for further orders or directions for the correction, construction, or execution of this Decree, including, without limiting the generality of the foregoing the implementation of the divestiture provided above." (R. 769)

Thus, should the decree stand as it is, the Government will be free at any time to urge before the District Court that it is inadequate. No intervention by this Court is required.

C. The Decree is Adequate to Remedy the Violations Which Were Found.

As has already been pointed out in ADT's principal brief (Br., pp. 167-71), the court below granted relief specifically directed against those violations urged by the Government which it found. Thus, the court divested Grinnell of its interest in the alarm company defendants and enjoined any restrictive or anticompetitive arrangement among all the defendants themselves or in combination with third parties. It forbade the acquisition of any central station concerns. It required the alarm company defendants in the future to file their standard price lists with the Department of Justice and to report any deviations from these lists, thereby enabling the Department effectively to forestall any pricing conduct which appears to be harmful to competition.

In its appeal brief, ADT objected only to two provisions of the decree below which would be applicable to it in the event the finding of violation were affirmed here: the prohibitory provision cast in the broad language of the Sherman Act and the prohibition against the further employment of Mr. Fleming. (Br., pp. 161-64) The Government has now indicated that it also deems these portions of the decree "inappropriate". (Br., pp. 94-95) We submit that the Government's arguments for the further extension of the decree are unfounded in each particular.

1. Divestiture of Portions of ADT's Business is Not Justified.

ADT's principal brief pointed out in considerable detail that the divestiture proposals which the Government proposed below were unnecessary, unworkable and potentially unfair to ADT and to its customers. (Br., pp. 172-81) This divestiture proposal, contrary to the statement in the Government's brief (Br., p. 83), was not limited to cities in which there was "no competing accredited central station service",[38] but rather was based on the arbitrary assumption that regardless of the competitive situation ADT should suffer some divestiture in every city where annual service revenues were $250,000 or more. Since the Government has not chosen to defend its proposal here, there is no need to reiterate all the things which were wrong with it.

We do reiterate, however, the conceded fact that the court below did not hold that ADT had itself monopolized the accredited central station market. Moreover, the District Court specifically found (directly contrary to the allegations of paragraph 28(b) of the complaint, R. 38):

> "However, it is only fair to add that from 1957 to 1961 defendant alarm companies' shares of central

38. This is demonstrated by the Government's own brief. The following cities designated as "Competitive Cities" in the Appendix (Br., p. 121) were included in the divestiture order proposed below (R. 144-149): Boston, Chicago, Cincinnati, Cleveland, Dayton, Detroit, Houston, Indianapolis, Minneapolis, Newark, San Francisco and Washington.

station subscribers and of revenue therefrom showed a slightly declining trend. Moreover, there is no persuasive evidence that any particular prospective entrant has been unable to begin operations, or that any specific CSPS firm has failed or been driven out of business." (FF 45, R. 756)

The Government does not quarrel with this finding nor, apparently, with ADT's demonstration based on the Government's own evidence (Br., pp. 141-43) that the rate of new entries has been accelerating and that these new entries have been taking an increasingly large share of accredited central station revenues on an accelerating basis (18.1% of the new business in 1958, as compared with 28.1% of the new business in 1961). (Br., pp. 143-44)

Nevertheless, the Government urges this Court to find in a total factual vacuum that "divestiture is appropriate." (Br., p. 89) The trial judge obviously knew that divestiture was an available remedy. He also obviously determined that the facts did not justify the entry of a divestiture order against ADT, and the Government does not point to a single additional fact which it would or should be able to call to his attention on a remand. The appeal on this point should be denied.

2. Restrictions on the Terms of ADT's Subscriber Contracts are Unjustified.

The form of defendants' service contracts was a subject which was explored at length and the trial court specifically found that these types of contracts were the norm in the business. (FF 6, R. 748) There was no finding that these contracts (or anything else) imposed any barriers to new entry. In fact, as shown above, the finding of the court was directly to the contrary. (FF 45, R. 756) The Government offers no factual challenge to this finding, but simply speaks vaguely of "barriers to entry" and "barriers to competitors". (Br., pp. 38, 90) On the basis of these generalized statements alone, plus the improper references

to defendants' settlement proposals, the Government would have this Court order the trial court to reconsider the whole issue.

The Government does not point to any specific evidence which it would seek to offer on remand, but rather seems to suggest that the burden should be on the defendants to show why further injunctive relief should not be ordered. It even goes so far as to suggest (Br., pp. 91-92) that it is up to the defendants to demonstrate that the published regulations of national insurance accreditation agencies mean what they say when they state that approved central station systems on subscribed's premises must be owned by the alarm company.

The regulations of the underwriters requiring the retention of title to protective equipment in wholly independent hands are the result of decades of experience with the problem of protecting property against calamities. As set forth in ADT's principal brief (Br., pp. 182-84), they are based on the necessity for assuring that systems are compatible and that they will be maintained. The Government itself concedes that systems which are poorly maintained will not function properly (Br., p. 8) and recognizes the necessity for compatibility by demanding that ADT be compelled to sell its equipment to competitors on the ground that they must "be assured of replacement parts to maintain" systems on the premises of ADT's present subscribers. (Br., p. 93) The decision of the trial court not to interfere with these long-established modes of providing protection is clearly not an abuse of discretion. On the contrary, in view of the Court's finding that there were no barriers to entry there was no warrant for tampering with a business practice which long experience has demonstrated to make a positive contribution to safety.

3. The Defendants Should Not Be Required to Manufacture Equipment for Other Central Stations.

The suggestion that ADT be required to enter the business of supplying protective devices to others is similarly totally without record support. There was no finding, or even claim, that ADT had monopoly power in the manufacture of protective devices.[39] In fact, when he was attempting to limit defendants' pretrial discovery, Government trial counsel stated on the record (R. 86-87):

> "My case is a service case. * * * We are not claiming that they have monopolized protection devices or anything like that"
>
> * * *
>
> "* * * it is possible that we would stipulate that the end companies, for instance, have all the protection devices that they need available to them. We would stipulate to that."

There is not a trace of evidence anywhere in the record that any central station competitor was ever impeded in its operations by an inability to obtain devices. Under these circumstances there is surely no reason to remand or reverse the District Court's determination on this issue.

4. The Government Does Not Need Visitation Rights.

The Government's argument for ordering the court below to "reconsider" the subject of visitation rights is the weakest in a long series of weak arguments on relief. Basically the Government contends that such rights have been granted in some other cases in the past and therefore they should be granted here. Obviously, the trial court decided that the provisions of the decree with respect to price reporting and continuing jurisdiction obviated the necessity for such rights.

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39. See, *e.g.*, R. 959, 1089, for lists of the many companies providing such devices.

CONCLUSION

For the above reasons, ADT reiterates the conclusion of its appeal brief that this case should be reversed and remanded for dismissal of the complaint on the ground of failure of proof. Should this Court not agree that there has been a failure of proof, then ADT joins in Grinnell's request for a reversal and remand for a new trial. Should this Court decide to affirm the decision below, the decree should be modified to eliminate the two provisions—the injunction phrased in broad statutory language and the dismissal of Mr. Fleming—which the Government concedes were inappropriate. The Government's request for a remand on the issue of relief should be denied.

Respectfully submitted,

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APPENDIX

The Government's Arguments Asserting a "High Product Differential" Between Accredited Central Station Service and Other Forms of Protection are Erroneous

The Government states that whenever a central station receives a signal, it "immediately dispatches guards to the protected premises * * *." (Br., p. 6) As to the bulk of the services rendered by central stations, whether or not accredited, this is not true. Industrial process supervisory and heating supervisory services never involve the sending of guards to the protected premises. Similarly, many sprinkler supervisory signals, the bulk of watchmen reporting signals and the majority of signals from burglar alarm systems require no guard response.

The Government urges that a central station system has "significant advantages" because "it reports not only actual hazards as they occur, but also any malfunctioning in the system itself that would preclude it from reporting a hazard * * *." (Br., pp. 6-7) The fact is that almost all electric protection systems actuate signals when there is a circuit break or short or release of water in a sprinkler-activated fire or supervisory system. This is equally true of local, direct connected, proprietary, telephone answering or central station systems and services.

The Government argues that central station service has an important advantage over other forms of protection in that "it guarantees that there always are trained personnel who will take immediate steps when a hazard occurs." (Br., p. 7) Only local alarm service does not "guarantee" hazard response to the same degree, and as the record demonstrates, there is a high degree of response even to local alarm systems because they are employed in densely populated areas where neighbors, passers-by or patrolmen do in fact respond. In addition, the ultimate response sought is not that of alarm company personnel but rather response by the police and fire department personnel.

Appendix

The Government urges that accredited central station companies "make frequent tests and inspections of the equipment [while] * * * users of other types of service, however, may not properly maintain them * * *." (Br., p. 8) Alarm companies furnishing the other forms of electric protection also test and inspect their equipment, and in fact they are required to do so under their subscriber contracts, which are in all essentials like those of central stations. Indeed, where subscribers to those other forms of electric protection desire insurance premium discounts the very same underwriters' rating agencies require such testing, inspection and maintenance.

The Government argues, "Operators of central station protection businesses found that until they became accredited there were many sources of protection service business for which they could not compete. * * *" (Br., p. 9) Concededly alarm company witnesses did confirm the fact that *some* customers insist upon accredited service. There is nothing in the record, however, to suggest that even a majority of central station subscribers insist upon or can use only accredited service. To the contrary, many of the services furnished by accredited central stations cannot be insurance-approved and, as to those that can, often subscribers are not interested in insurance approval. For example, 60% of ADT's central station burglar subscribers use non-certificated service and the bulk of all burglar alarm subscribers to such services from accredited central stations similarly forego certification.

The Government urges that "significant advantages go a long way to explain both the strong consumer preference for accredited central station service, and the recognition by the insurance industry of its superior qualities." (Br., p. 50) As outlined in considerable detail in ADT's brief, the extent of insurance industry recognition of superior qualities is questionable, and at best only relative in com-

parison with other forms of protection. Obviously it has absolutely no significance as to those services furnished by accredited central stations which are unapproved by the underwriters. We submit, moreover, that even if the unqualified characterization of insurance industry recognition of superior qualities could be sustained, there is nonetheless a total absence of evidence supporting the Government's declaration of a "strong consumer preference." The voluminous evidence of reasonable interchangeability and cross-elasticity of demand which characterizes this record disproves that conclusory argument. Moreover, the Government failed to present a single consumer witness, survey or other persuasive reading of consumer preferences to show that any meaningful proportion of customers for protection have a "strong preference" for accredited central station services.

The Government urges that accredited and unaccredited central station services are so different in quality that they are not in the same market. (Br., p. 51) But the two "exclusive features" which the Government argues "make accredited central station service superior to all others" (Br., p. 50) are equally characteristic of unaccredited central station service; both types of central station service automatically warn of defects in the hazard-detecting equipment and both maintain trained personnel on a full-time basis to handle signals received. There is no valid record support for the Government's broad-brush assertion that "nonaccredited central station service is of minor significance in the business." (Br., p. 52) The testimony of dozens of alarm company witnesses and the dollar volumes of revenue they attributed to unaccredited central stations, even though at most only illustrative, wholly belie this contention. And even if many or most unaccredited central stations ultimately become accredited for one or more services at some point in time, that fact in no way demon-

strates that their dollar volume is either small before that time or non-competitive with the business of already accredited central stations. Contrary to the Government's contention, defendants have not "in effect conceded that unaccredited central station service is an insignificant part of the business." (Br., p. 54) The statement that "practically all non-defendant central station companies in the United States are members of the Central Station Electrical Protection Association" was contained in a brief filed with the court below directed to discussion of relief in terms of the assumption that the Government's definition limited the market to accredited central stations only, and all matters discussed therein were in the context solely of accredited central stations. (R. 203-50)

Contrary to contentions below that fire insurance premium discounts are available only for accredited central station services, the Government now concedes that "*some* rating bureaus allow discounts upon fire insurance only for accredited central station service" (Br., p. 55). The Government can cite only one such bureau, that in Washington, D. C., which so limits premium discounts, and the record is replete with evidence that the practice is to the contrary elsewhere.

The Government states, "Virtually all central station fire alarm systems installed by accredited companies have been inspected and approved by the insurance underwriters, thus *qualifying* the subscribers for substantial premium discounts." This corrects the Government's earlier statement that virtually all such fire alarm subscribers receive premium discounts (Br., pp. 17, 55). The record here nowhere delineates how "substantial" such premium discounts are either absolutely or in relation to those for other forms of protection.

Appendix

The Government states:

> "While *ADT erroneously asserts* (Br., pp. 77-78) that 'less than one-half' of the subscriber companies apply NBCU rates, the manager of the Burglar Committee of the NBCU testified that: '* * * a subscriber, *if he subscribes to the National Bureau for a form of insurance, such as burglary,* he has to comply with our rules, our rates, and policy forms identical to the way any member company would have to, so they have no more leeway. Q. Does that mean that every member and every subscriber to the National Bureau is obliged to grant the discounts which are set forth in your manual? A. That is right.' " [GX 346, p. 43.]

The testimony of the witness upon which ADT relies and which refutes the Government is as follows:

> "Q. Of these 242 subscribers, is it the fact that some portion of them is subject to your requirements only insofar as lines of insurance other than burglary are concerned, for example? A. Yes.
>
> "Q. Do you know how many of these 87 members and how many of these 242 subscribers—I withdraw the part about the members—how many of these 242 subscribers are subject to your burglary requirements? A. I do not know.
>
> "Q. Do you know whether it is half? A. I am quite sure that it is less than half.
>
> "Q. And it may be that those companies are subject to your burglary insurance requirements in only one or some states? A. It could be." (GX 346, p. 49; see also ADT's Brief, pp. 77-78 for additional testimony directly quoted in this issue)

The Government argues that watchmen service is not "reasonably interchangeable" because it is "far more

costly than accredited central station protection [and] often does not provide as great a discount as accredited central station protection" (Br., pp. 58-59). The Government correctly states that ADT erroneously declared at page 81 of its brief that a 90% burglary insurance premium discount is available for watchmen service. As ADT's brief earlier stated (p. 77), the three 30% discounts available "are applied consecutively against a declining balance." The Government, however, in urging that wages for watchmen service may exceed central station service charges, fails to note that watchmen service also earns additional insurance savings in connection with fire insurance, not just burglary insurance. Moreover, watchmen frequently perform other services during their tours of duty so that only part of any higher cost can be properly allocated to protection. The Government must totally ignore such testimony as that of its Chicago witness, Stackler. In addition to accredited central station service, he testified that he furnishes watchmen service and that there are 12 other companies furnishing that service in Chicago, 2 or 3 with more business in that area than he has and others with as much. He actively solicits watchmen service customers, both his own and those of other companies, because he considers them accredited central station service prospects (GX 357, pp. 73, 143-44).

The Government argues (Br., p. 60, n. 25), "While the discount schedules used by the National Bureau do not distinguish between [the discounts available for local alarm and central station burglar service] as applied to banks, the point is unimportant. The member and subscriber companies of the National Bureau derived earned premiums of less than $130,000 from all banks during the year 1961." This argument is specious. The Government's basic contention is that any differences in insurance premiums discounts spelled out by the National Bureau reflect

the superiority of accredited central station service. Many of these discounts are identical or closely on a par. Whether or not subscribers, like banks, elect to use approved service in large volumes is unimportant if the Government's basic argument has validity. Moreover, the volume of bank insurance premiums is unimportant, because most banks use bankers' blanket bond coverage, rather than insurance written solely for the coverage of vaults.

The Government apparently concedes that proprietary systems in fact compete with accredited central station service, but argues that they "can be used only by the very large businesses or the Government." (Br., p. 61) ADT made clear on its brief the fact that it does not contend that proprietary systems and service (they can be leased and serviced as well as owned) are competitive with central station service across the board. Nonetheless they play a significant competitive role and have impact upon central station service, particularly to the extent that the Government urges that large customers cannot be served by forms of protection other than accredited central station services. And where proprietary systems and services do not compete head-on with accredited central station services, the other forms of protection do, so that at all points on the spectrum of accredited central station services they face competition.

The Government also apparently concedes that direct connected alarm services compete with accredited central station service. It argues only, "*Most* cities that have an accredited central station company do not permit direct connected service. * * *" The fact is that many cities where ADT has accredited central stations do allow direct connected service, either without limitation or in part. They include, for example, Albany, Atlanta, Bridgeport, Birmingham, Cincinnati, Columbus, Davenport, El Paso, Louisville,

New Haven, Rochester, Salt Lake City, Seattle, Sioux City, Tacoma, and Youngstown. In addition, in the suburban areas where accredited central stations solicit and serve customers, direct connected services and systems are uniformally permitted even where the adjoining city proper does not allow use of the police or fire department facilities for that type of service.

To sum up the position stated in ADT's brief, even if we accept, *arguendo,* all of the Government's arguments as to the purportedly distinctive aspects of other forms of protection which make them different from services furnished by accredited central stations, that leaves open the critical question whether customers, looking at the composite of price, quality and characteristics, deem those differences so significant as to isolate accredited central station services from meaningful competition by other forms of protection. While the Government concedes that customers must be the final judges of "how different" substitute products or services are, it offers no customer evidence or testimony to support its market arguments and it totally ignores the wealth of evidence, including testimony of its own alarm company witnesses, that concerns similarly situated in all respects pertinent to a choice of protection regularly consider competing forms of protection and make different elections as between accredited central station services and those others. And most importantly, the Government refuses even to discuss the evidence of marked price interrelationship sensitivity and response between accredited central station services and other forms of protection.

REPLY BRIEF

PAGE

POINT II—The only facts offered by the Government on this appeal to support the judgment against AFADEL are (1) AFANY's participation in the 1907 agreement, (2) non-expansion outside of the three cities after termination of the 1907 agreement in 1954, and (3) two unconsummated proposals made by AFADEL for the purchase of the assets of Central Station Signals, Inc. 13

CONCLUSION 18

IDENTIFICATION OF DESIGNATIONS

Name	*Designation*
Automatic Fire Alarm Company of Delaware (the appellant, a Delaware holding Company, formed in 1920 which thereafter acquired a controlling stock interest in AFANY)	AFADEL
Automatic Fire Alarm Company (a non-defendant, New York corporation, originally organized in 1873, which became a subsidiary of the appellant AFADEL in 1920)	AFANY
American District Telegraph Company (a defendant appellant)	ADT
Grinnell Corporation (a defendant appellant originally known as General Fire Extinguisher Company)	Grinnell
Holmes Electric Protective Company (a defendant appellant)	Holmes
Conclusions of Law	CL
Findings of Fact	FF
Opinion on Liability	OL
Opinion on Remedy	OR
Central Station Protection Service	CSPS
Sprinkler Supervisory and Water Flow Alarm Service (also known as Sprinkler Supervisory and Valve Alarm Service)	SSWF
Supervisory Sprinkler Service	SSS

IN THE

Supreme Court of the United States

October Term, 1965

No. 77

AUTOMATIC FIRE ALARM COMPANY OF DELAWARE,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

On Appeal from the United States District Court For the District of Rhode Island

REPLY BRIEF FOR APPELLANT AUTOMATIC FIRE ALARM COMPANY OF DELAWARE

Preliminary Statement

As in its main brief, Automatic Fire Alarm Company of Delaware ("AFADEL") adopts without repetition the reply made by ADT on the question of relevant market, as well as the reply made by Grinnell on the questions of fair trial and due process.

Just as the District Court in arriving at its decision ignored the specific situation of AFADEL, a Delaware holding company doing no CSPS[1] or other business, and its only operating subsidiary, AFANY, the Government in its brief refrains from making more than the barest references to AFADEL or AFANY and makes no response to either the legal or the factual arguments advanced in AFADEL's brief (Gov. Br., pp. 10, 12, 14-17, 28, 36, 67-70, 73-74 and 81).

Once again AFADEL finds itself embraced in a group as one of the alarm company defendants and apparently assumed to have been guilty simply by association.

The Government's brief makes it abundantly clear that only by blanket assimilation of this appellant's activities with those of the other defendant alarm companies, notably ADT, may any semblance of a case be made against this appellant. The Government lays the ground work for this approach by stating at the outset that it will refer to ADT, Holmes, and AFADEL "collectively" as the alarm company defendants (Gov. Br., p. 5). It then proceeds to discuss in detail ADT's pricing practices (pp. 19-24), threats of retaliation against competitors (pp. 24-26), and opening new central stations to discourage competition (pp. 27-28), all without any mention whatsoever of AFADEL or AFANY (*id.* at pp. 76-79). It also deals exclusively with ADT's procedures in its attempt to justify the finding of a national market (*id.* at pp. 35 and 65).

Another example of how the Government ignores the factual situation specifically applicable to AFADEL ap-

1. A table of abbreviated designations appears at p. iii, *supra*.

pears in the fact that the Government claims that central station companies, to compete effectively, must offer all types of service, and that all such services are generally provided from a single office (Gov. Br., pp. 46-47). This assertion is made despite the fact that admittedly "AFA (AFANY) supplies only fire protection service," and that "Holmes limits itself to burglary service" (*id.* at p. 10), and that both have thus operated a single service successfully for many years. Thus in reality there is no basis for the assertion that a central station protection service company cannot compete effectively without offering all types of central station protection service. The Government's generalization was made, of course, in an attempt to rationalize the District Court's treatment of the entire central station service business as a single market.

Apart from the passing references to AFADEL and AFANY noted above, and the coupling of those companies with the other alarm company defendants, the Government has not even attempted to answer AFADEL's arguments in this Court. One cannot tell whether those arguments were considered unworthy of note, or whether the Government has no answer to them. In the absence of answering argument, there can be little reply beyond pointing out concessions made in the Government's brief, and reiterating as against the Government's bulk presentation, the observations already made in regard to the District Court's blanket treatment of the alarm company defendants in the decision below.

It should at the outset be emphasized that although AFADEL in its main brief repeatedly denied that there

was any evidence to support a finding (1) that it exercised or possessed any degree of monopoly power, singly or otherwise, or (2) that it was engaged in interstate commerce or in any activity affecting interstate commerce, the Government has not challenged any of these basic denials.

Concessions by the Government

Commendably, the Government has been frank to admit that some findings are without support in the record, and that some of the relief granted was inappropriate. In addition it suggests the new rule of law enunciated by the District Court is unnecessary in the present case, and therefore it makes no effort to justify it. We, therefore, undertake to state the effect of these concessions in relation to AFADEL's appeal.

1. The blanket injunction against violating the antitrust laws, without a specific enumeration of the precise practices enjoined, was improper.

In its main brief, AFADEL contended that a blanket injunction against any conceivable violation of the Sherman Act is improper (Point VI, pp. 46-49). The Government now takes the position that on remand of this case, it would be appropriate for the District Court to replace or implement the general prohibition against violating the law with a specific enumeration of the precise practices prohibited (Gov. Br., pp. 38, 95).

2. The Government does not defend the new rule of law enunciated by the District Court holding that the showing of the holding of a predominant share of the relevant market creates a presumption of unlawful monopoly, thereby shifting the burden of proof to the defendants, and thereby imposing upon them an impossible burden of affirmatively showing their innocence.

The Government now argues that the acquisition by Grinnell of controlling interests in the three alarm company defendants was a deliberate, calculated purchase of market control, and that thus defendants' monopoly power was consciously acquired and not thrust upon them, and consequently there is no need for this Court to consider the District Court's view that "once the Government has borne the burden of proving what is the relevant market and how predominant a share of that market defendant has, it follows that there are rebuttable presumptions that the defendant has monopoly power and has monopolized in violation of §2"; and that the defendant then has "the burden of showing that its eminence is traceable to such highly respectable causes as superiority in means and methods which are 'honestly industrial' " (Gov. Br., p. 82).

The Government thus declines to defend or support the new rule of law first enunciated by the District Court. The Government relies solely on the contention that the record affirmatively shows conscious monopolization. In making this assertion, the Government again falls into the error of speaking collectively of "the defendants' monopoly power". Although, as AFADEL's brief repeatedly points out, it (actually its subsidiary AFANY) has been found

to have a mere 2% of a falsely assumed national market in which it never participated, and that there is no evidence that it has or ever had any local monopoly, or that any of its operations have or ever had any national characteristic, the Government has not attempted to point out any error in those assertions. The District Court itself found that AFANY had active competition in the three separate cities in which its three central stations independently operated (Finding 9, R 749).

If the new presumption indulged in by the District Court is not to be defended, there is nothing in the factual situation peculiar to AFADEL which can lend any support whatsoever to the drawing of an inference either that it had monopoly power or that it consciously sought, acquired or maintained any such power.

In effect, the Government says that by the time Grinnell acquired a controlling interest in ADT, the latter already had a monopoly (Gov. Br., p. 42). There has not been the slightest suggestion that AFADEL did anything after it was first incorporated in 1920 and then acquired a controlling stock interest in AFANY, by way of conspiring with ADT in the latter's acquisitions or in anything which was done by ADT *vis-a-vis* its own customers or competitors.

The Government now suggests that this Court ignore the new presumption, adopted by the District Court's pronouncement, as unnecessary to the decision of this case. But whether or not this Court disclaims the new doctrine or expressly refuses to pass upon it as the Government

suggests, the fact remains that without the support of this novel doctrine, the case against this particular defendant-appellant, AFADEL, and/or the non-defendant subsidiary, AFANY, must fall unless this Court is to adopt another new rule and find that despite the total lack of evidence, AFADEL must be blanketed into a group and held responsible for acts carried out by, for example, AFANY in 1907 (thirteen years before AFADEL was incorporated), or by actions involving Holmes (a corporation with which neither AFADEL nor AFANY can be said to have had any relation whatsoever until control of Holmes was bought by Grinnell in 1950).

The fact that majority control of its stock was acquired by Grinnell cannot possibly be the basis of any finding that that could be a step in conscious monopolization by AFADEL. A year later Grinnell bought the controlling interest in Holmes but that was not a step taken by AFADEL. Whether or not AFADEL knew about the acquisition of the Holmes stock or Grinnell's reason for acquiring that stock, this was not a possible basis for implying that it was a further step in conscious monopolization by AFADEL. The same applies to the subsequent acquisition by Grinnell of a controlling interest in ADT.

The main thrust of the Government's argument today seems to be that ADT had become a monopoly sometime prior to 1953, and that Grinnell's successive acquisition of control over the three alarm company defendants over a period of four years indicates a conscious intention to acquire monopoly power and consequently to monopolize.

AFANY, to expand outside of the three cities or into the burglar alarm business.[3]

On the jurisdictional question of interstate commerce the Government's contentions are alleged generalized "constant use of interstate commerce" and "national pattern of business", are confined to the carrying of alarm signals across state lines, a far-flung structure of national planning, lapsed agreements, inspection, certification and reduction of rates by national insurers, national schedules of prices, rates and terms, and discount prices to customers operating multi-state enterprises (Gov. Br., pp. 63-64), none of which apply to this appellant except that non-defendant AFANY (but not defendant AFADEL) was a party to the lapsed 1907 agreements, and that national insurers are concerned with fire and burglary protection at the local level where AFANY operates. The Government concedes that the activities of an accredited central station are local in that it serves only a narrow geographical area. This is true of each of AFANY's three central stations, the activities of each of which are strictly intrastate.

3. The Government quotes from a letter from the president of AFANY to the president of Grinnell dated February 13, 1959, in an attempt to show an admission of improper territorial restrictions and confinement to sprinkler and fire alarm services (Gov. Br., p. 18; Ex. 94; R 1483-1485). That letter was written five years after the 1907 agreements had expired, six years after Grinnell had acquired majority control of ADT, and 10 years after Grinnell had obtained stock control of AFADEL. At the time of the letter AFADEL, AFANY's parent, and ADT were common subsidiaries of Grinnell. In this situation, AFANY and ADT could hardly be expected to compete with each other. Such competition could only have the effect of shifting business and revenues from one Grinnell subsidiary to another, which would have affected the existing rights of the different minority stockholders in each of these subsidiaries.

The Government goes on to recite various activities attributed to ADT (*id.* at pp. 64-66) from which it arrives at the entirely unwarranted conclusion that the "accredited central station business is an interstate business". So this appellant is, according to the Government and the District Court, engaged in interstate commerce although none of its business is interstate or affects such commerce.

The Government brief does not even mention the questions of interstate commerce with respect to AFADEL or AFANY, and yet this is an essential jurisdictional requirement absent which there can be no violation of the Sherman Act. The plain lack of interstate commerce requires dismissal of all charges against AFADEL.

POINT II

The only facts offered by the Government on this appeal to support the judgment against AFADEL are (1) AFANY's participation in the 1907 agreement, (2) non-expansion outside of the three cities after termination of the 1907 agreement in 1954, and (3) two unconsummated proposals made by AFADEL for the purchase of the assets of Central Station Signals, Inc.

The Government's statement of the questions presented on these appeals confines the issues first to whether the defendants monopolized the accredited Central Stations Protection Service business in violation of §2 of the Sherman Act, and second, whether the relief granted below was inadequate in some respects, and inappropriate in others, and finally, whether the defendants were deprived of a fair trial (Gov. Br., pp. 2, 3).

Elsewhere the Government notes that the offense of monopolization under §2 of the Sherman Act consists of (1) possession of monopoly power and (2) willful acquisition or maintenance of that power. The Government then goes on to note, under its construction of the precedents, that the existence of such power ordinarily may be inferred from possession of a dominant share of the market. Finally, the Government claims that the defendants had 87% of the accredited central station business, and if that business is the relevant market, there can be no doubt that the defendants have monopoly power.

Regardless of what inferences may ordinarily be drawn, the District Court specifically found that the alarm company defendants did not have the power to control prices or to exclude competition from the market (Findings 45 and 46, R 756). No one has challenged these findings and they leave no room for contrary presumptions to support an inference of monopoly power. This is particularly important in the case of AFADEL, whose operating subsidiary has been found to have a mere 2% of the national market designated by the District Court.

In any event, any claimed relation of AFADEL to what the other defendants did or did not do depends entirely on making some imputation out of the fact that Grinnell acquired the controlling stock interest in AFADEL in 1949, and then all the stock of Holmes in 1950, and finally a controlling interest in the stock of ADT in 1953.

While the Government uses a blanket argument that the defendants collectively acquired and maintained market power by restrictive and exclusionary practices, it will be

found that as far as AFADEL is concerned, and apart from all the attempts to blanket it into some kind of guilt by association, the case comes back to nothing more than the 1907 agreement made by AFANY (and not by AFADEL), non-expansion by AFANY after 1954, and two offers to purchase assets of Central Station Signals, Inc., at least the last of which was conditioned on Government approval as to legality, and fell apart when the Government suit was brought (the 1907 agreement, Exhibit 80-B, R 1373-1380; Exhibit 80-C, R 1380-1386; McDowell deposition, R 2904-2908; Exhibit 57, R 1299-1303).[4]

Unless AFADEL is to be drawn into a charge of restraint or monopolization of interstate trade and commerce merely because a majority of its stock was at some time and entirely without its participation acquired by another corporation which later acquired control of another corporation which is allegedly engaged in interstate commerce and allegedly which the Government claims, has restrained and monopolized interstate commerce, then the case against AFADEL should be dismissed.

4. The Government has, of course, mentioned as another restrictive practice the contract terms used in dealing wih subscribers (Gov. Br., p. 79), but its only reference to AFANY in this connection is in Ftn. 33, where it is pointed out that AFANY uses 5-year contracts while Holmes' contracts run from 3 to 5 years, and in Ftn. 34, where it is noted that both Holmes and AFANY retain title to all service equipment installed on the subscribers' premises. There is nothing inherently wrong with the practice of using such contract terms, and nothing has been set forth to show that this involved the use of an otherwise legal practice with an improper or predatory motive. Furthermore, the five-year contract is commonly used by competitors. Such a term is considered necessary to provide for recovery of original and continuing costs over a period of years (R 2845, 2847, 2853). To deprive AFANY of the right to use the traditional form of contract while its competitors remain free to use it, would place AFANY at a complete competitive disadvantage.

The same observations apply equally in regard to the alleged division of markets, acquisitions by others, and pricing practices engaged in by others. Unless these matters are to be brought home to AFADEL by mere subsequent indirect association or because of inertia on its part, the case must likewise fall.

The Government would, as the District Court below did, ignore the particular situation of AFADEL. Perhaps if AFADEL was completely owned by Grinnell, these matters might be considered academic. But the significant fact remains that there are minority stockholders having 11% of the stock of AFADEL whose interests are affected by the broad sweep of the adjudication of violation with all the consequences that can flow therefrom under the provisions of the Sherman Act itself.[5] Other damage to the minority stockholders' interests would result from the more restrictive injunction which the Government now seeks. It is difficult to tell which of these consequences may be worse. The corporation may be wiped away by damage actions seeking the private penalties which the Act affords so that the future may be unimportant. On the other hand, if AFANY, the only subsidiary of AFA-

5. Even though Grinnell had majority representation on the board of directors of AFADEL and AFANY, it always took the position that it could not do anything which might favor one subsidiary company over the other since there were minority interests in both ADT and AFADEL (R 684, 690, 691). The board of directors of AFADEL never overruled any proposal of the AFADEL management (R 693-694). The Government brief notes that the facts stated in Finding 29 implying board compliance with all but one of Grinnell's proposals or plans was in error (Gov. Br., p. 82, footnote 36). Moreover the Government does not contend that Grinnell controlled the management of any of the alarm company defendants. Instead it predicates its claim of monopolization upon Grinnell's acquisition of interests in the alarm company defendants.

DEL, is to be required to go into the market place wearing not only the chains imposed by Judge Wyzanski but those which the Government would have this Court add, it is clear that AFANY will soon lose all of its business to its active competitors in New York, Philadelphia and Boston, who will not have to operate under any such restrictions.

All of these consequences which are so punitive in effect emphasize the importance of searching the record on this appeal, AFADEL's sole opportunity for review, to determine whether there is present the necesary foundation for the District Court's adjudication that AFADEL violated Sections 1 and 2 of the Sherman Act.

Such foundation can only be a factual finding of willful restraint of trade, and of actual monopoly power and the exercise thereof, all in or affecting interstate commerce, adequately and demonstrably supported by a preponderance of the evidence.

The meager elements of fact now relied on by the Government are wholly inadequate to justify such a finding as to AFADEL.

Conclusion

The decree appealed from should be reversed and the case should be remanded with instructions to dismiss the complaint as to AFADEL. If such dismissal is not directed, the case should be remanded for a new trial before another judge with appropriate instructions.

Respectfully submitted,

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